



# Data for Governance Alliance

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Electoral democracy in Africa: Challenges and opportunities

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## Introduction

Within the last decade, democracy has been in a state of perpetual crisis threatening all forms of representation and accountability. Elections have become heavily contested and “costly adventures implemented to arrest choice and putting democracy in reverse”. The evidence from the continent unveils a trend of regressive practices which occupy both the procedural and substantive dimensions of the quality of democracy. Although regular elections have become the feature of most countries in Africa since the 1990s, they however, have served to maintain and provide formal legitimacy to the incumbents rather than providing the electorate with a genuine opportunity to choose their leaders.

As is evident across the continent, after each plebiscite new forms of undemocratic culture(s) emerge. A dominant feature of such culture are competitive authoritarian regimes wherein autocrats purport to call for meaningful multiparty elections but engage in serious democratic abuse.<sup>1</sup> These elections are oftentimes characterised by extreme resource inequality between the incumbents and the opposition, insidious executive attacks on the opposition, suppression of democratic freedoms and other repressive practices aimed at undermining genuine political competition and disenfranchisement of the populations.

Corruption, fraud, politically-motivated violence – the “usual” standard tools of manipulation, have routinely been employed to undercut the growing demand for representative and accountable governance. These have been joined in by new tools honed by incumbents to “hinder and not necessarily completely derail the democratic project”. As aptly captured by Nigerian Human Rights Scholar, Chidi Anselm Odinkalu:

*Across the continent, incumbents with spent legitimacy go into elections with terminal hubris. With public resources, they compromise every institution in the election management and dispute resolution chain, frustrating the basic structure and rules of electoral contests. For clarity, elections are ordinarily supposed to be governed by determinate rules designed to ensure that the outcomes are indeterminate until results are announced. Now across the continent, ruling parties make the rules indeterminate and suborn the courts to ensure that this is the case, all to ensure that the outcomes are pre-determined.<sup>2</sup>*

To compound these challenges, a new phenomenon of “constitutional tempering” has taken root in Africa. Since 2015, at least 10 leaders have successfully “reset the clock” on their tenure by revising the constitution or adopting a

<sup>1</sup> International IDEA, Emerging Trends and Challenges of Electoral Democracy in Africa <https://www.idea.int/sites/default/files/publications/emerging-trends-and-challenges-of-electoral-democracy-in-africa.pdf> [Accessed 10 March 2024].

<sup>2</sup> Chidi Anselm Odinkalu , Counting the Cost of Electoral Impunity in Africa <https://newswirelawandevents.com/counting-the-costs-of-electoral-impunity-in-africa/> [Accessed 10 March 2024].

new one.<sup>3</sup> Changes to the constitution are then used to justify the claim that the incumbent is entitled to serve a fresh set of terms under the new constitution. Leaders in Chad, Comoros, Côte d'Ivoire, Guinea, and Togo, among others, all followed this route.<sup>4</sup>

In many jurisdictions elections are heavily controlled by the executive and stage-managed by the electoral management bodies posing serious challenges for domestic and international observers to ascertain their credibility. Many countries in the SADC region – Angola, Democratic Republic of Congo (DRC), Eswatini, Mozambique and Zimbabwe suffer from excessive executive interference in the running of the elections.

## **Upcoming Elections in the ECOWAS region: An overview**

Several countries in the ECOWAS region, among them Burkina Faso, Guinea, Ghana, Mali are due for elections in 2024. Four of these countries that were victims of unconstitutional changes of governments, are also scheduled for elections in 2024 to fulfil commitments made as part of the negotiated transitions.

**Burkina Faso** goes to the polls in July 2024 following two successive coups led by Colonel Paul-Henri Damiba who ousted President Roch Kaboré in January 2022 and Captain Ibrahim Traore in September 2022. Although Captain Traore had agreed to abide by the transitional arrangement negotiated by ECOWAS, he has repeatedly postponed elections. These extraconstitutional seizures of power have undermined Burkina Faso's nascent democracy punctuated by decades of military rule.

The suspension of the elections is consistent with Captain Traore's ad hoc nature of his presidency. Laws are arbitrarily applied and decisions taken at the whim of the junta leader including the voluntary conscription of critics of the government among them journalists, opposition politicians and civil society groups.<sup>5</sup> Violence has surged under his rule amidst a failure to restore stability within the country. Restrictions on political parties coupled with shrinking civic space and crackdown against the media and peaceful dissent are persistently used to maintain the appearance of popular support for the junta.<sup>6</sup> With space for dissent extremely limited, there is a growing realization that military junta has no intention of relinquishing power as previously agreed under an ECOWAS deal.

<sup>3</sup> Mubim Adewumi Bakar, Conflict Trends, Political Reforms and Implications for Democracy and Instability in West Africa: The Way Forward for ECOWAS and Member States. <https://www.accord.org.za/conflict-trends/political-reforms-and-implications-for-democracy-and-instability-in-west-africa-the-way-forward-for-ecowas-and-member-states/> [Accessed 29 May 2024].

<sup>4</sup> Siegle, J, Cook, C "Presidential Term Limits Key to Democratic Progress and Security in Africa" *Orbis* 65(3), 467-482.

<sup>5</sup> Tanguy Quidelleur. *MegaTrends Africa. Arming Civilians in Burkina Faso.* [https://www.megatrends-africa.de/assets/afrika/publications/policybrief/MTA\\_PB22\\_2024\\_Quidelleur\\_Distributing\\_Weapons\\_and\\_War\\_on\\_Terror\\_in\\_Burkina\\_Faso.pdf](https://www.megatrends-africa.de/assets/afrika/publications/policybrief/MTA_PB22_2024_Quidelleur_Distributing_Weapons_and_War_on_Terror_in_Burkina_Faso.pdf) [Accessed 31 May 2024].

<sup>6</sup> Human Rights Watch. *Mali: Junta suspends Political Parties, Associations.* <https://www.hrw.org/news/2024/04/12/mali-junta-suspends-political-parties-associations>. [Accessed 29 May 2024].



Elections in **Mali** were scheduled for 4th February 2024; however, they have been postponed by the military junta citing “technical reasons” notwithstanding numerous assurances that it would hold elections and return the country to civilian rule. Democratic space has shrunk dramatically under the junta. Political opponents and independent civil society actors are intimidated while journalists are threatened, have their credentials revoked, or are arrested.<sup>7</sup> Perhaps the key takeaway from the postponement of the elections in Mali is that the military intends to remain in government indefinitely. This, however, is not new given the country's political history littered with coups since its independence.

The **Senegalese** elections which had been postponed by the outgoing President Macky Sall and reversed by the Constitutional Council on the 6<sup>th</sup> March 2024, came as a huge relief, not only to the people of Senegal but across the West African region. Not only were the elections welcome news for Senegalese democracy but for ECOWAS which had been struggling to defend the principles of multiparty politics and elected government after several military coups in the region. Over the past three years Senegal was a haven of heightened political tension punctuated with a series of confrontations between the security forces and the opposition supporters fronted by charismatic leader Ousmane Sonko. Many young protesters were thrown into jail.<sup>8</sup>

Potentially, what transpired in Senegal has region-wide significance in restoring faith in the ballot box and in the institutions of democracy that safeguard people's inviolable right to political choice.<sup>9</sup> More so, the region can also draw valuable lessons from Senegalese democratic development grounded through an active and organized civil society fronted by vibrant youth participation which has been pivotal in providing checks and balances to public officials including resisting third term overtures by outgoing President Macky Sall and his predecessors.<sup>10</sup>

With incumbent President Nana Akufo-Addo completing his second and final term in office, **Ghana** is heading for an election in December to choose a new leader. The December poll marks Ghana's fifth presidential succession since returning to multiparty democracy in 1992. Although the political landscape has been dominated by two political parties – New Patriotic Party (NPP) and the National Democratic Congress (NDC) – the smooth power transfers have

<sup>7</sup> Africa Center for Strategic Studies. Mali: 4 February. <https://africacenter.org/spotlight/2024-elections/mali/> [Accessed 29 May 2024].

<sup>8</sup> Crisis 24. Senegal: Protests and heightened security likely nationwide through at least early June amid a high-profile court verdict. <https://crisis24.garda.com/alerts/2023/05/senegal-protests-and-heightened-security-likely-nationwide-through-at-least-early-june-amid-a-high-profile-court-verdict-update-2> [Accessed 29 May 2024].

<sup>9</sup> Paul Melly, Chatham House, Democracy in West Africa: Why Senegal's election crisis matters? [https://www.chathamhouse.org/2024/03/democracy-west-africa-why-senegals-election-crisis-matters?utm\\_source=Chatham%20House&utm\\_medium=email&utm\\_campaign=14398189\\_Africa%20Programme%20%7C%20March%202024%20Newsletter&utm\\_content=CTA&dm\\_i=1S3M,8KLPP,CYJDD4,ZHVB8,1](https://www.chathamhouse.org/2024/03/democracy-west-africa-why-senegals-election-crisis-matters?utm_source=Chatham%20House&utm_medium=email&utm_campaign=14398189_Africa%20Programme%20%7C%20March%202024%20Newsletter&utm_content=CTA&dm_i=1S3M,8KLPP,CYJDD4,ZHVB8,1).

<sup>10</sup> Cornejo, R.S. et al Senegal: A Country Report based on Data 1900 -2012. V-Dem Institute. [https://v-dem.net/media/publications/cr006\\_senegal.pdf](https://v-dem.net/media/publications/cr006_senegal.pdf) [Accessed 5 April 2024].

amplified Ghana's reputation as a beacon of democracy, both in terms of respecting electoral outcomes and power sharing in the ECOWAS region.

Ghana's flagrant democracy has also been nourished by the independence, integrity and professionalism of the Electoral Commission that has adopted key reforms since the 2020 elections and fostered participation across civil society and political players alike.<sup>11</sup> Civil society has also weighed in with pushing through reforms, increasing citizen participation, and providing political parties with platforms of debate on substantive policy issues. Despite all these positives, the elections will come at a time Ghana's economy is in bad shape characterized by elevated inflation, subdued growth, and substantial pressure on public finances and debt sustainability<sup>12</sup> coupled with regional security challenges faced by its northern neighbour Burkina Faso.

**Guinea**'s upcoming presidential and legislative elections due in December 2024 present an opportunity for the military leadership fronted by Colonel Mamady Doumbouya to return the country to civilian rule. Colonel Doumbouya seized power in September 2021 from erstwhile President Alpha Condé who had violated the Constitution's two-term limit.<sup>13</sup> The upcoming elections are viewed as a fulfilment of the 10-point transition roadmap negotiated by ECOWAS which has been affirmed by the military establishment.<sup>14</sup> Essentially, the military leaders have re-affirmed their non-participation and serving in the new government and has allowed some debate on the constitutional changes. Some of the key changes include subjecting all executive appointments to parliamentary oversight, creating stronger protections from political interference for independent bodies, and reinforcing the country's two-term presidential term limit.<sup>15</sup>

Notwithstanding these positives, the military leadership's implementation of the transitional arrangements has been muddled in secrecy with little financial commitments and political will raising fears that the junta may want to perpetuate its stay in power.<sup>16</sup> Other areas of concern include the timelines for the organization of the constitutional referendum that must precede the local, legislative, and presidential elections by the end of December 2024. Over and above the technical and operational difficulties of meeting this deadline, opposition parties and civil society groups are averse to the responsibility of running the elections being ascribed to the Ministry of Territorial Administration

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<sup>11</sup> Oxford Economics Africa. [20240131-RB-Africa-Elections-1.pdf \(oxforeconomics.com\)](https://www.oxforeconomics.com/reports/20240131-RB-Africa-Elections-1.pdf) [Accessed 29 May 2024].

<sup>12</sup> World Bank in Ghana. <https://www.worldbank.org/en/country/ghana/overview> [Accessed 7 April 2024].

<sup>13</sup> Adem, K. Abebe. The Conversation. Africa's attempts to abandon practice of presidents for life suffer another setback. [Africa's attempts to abandon practice of presidents for life suffer another setback \(theconversation.com\)](https://theconversation.com/africas-attempts-to-abandon-practice-of-presidents-for-life-suffer-another-setback-180300) [Accessed 29 May].

<sup>14</sup> Paulin Maurice Toupane and Aïssatou Kanté. Institute for Security Studies. ECOWAS support remains crucial for Guinea's peaceful transition. October 2023. <https://issafrica.org/iss-today/ecowas-support-remains-crucial-for-guineas-peaceful-transition> [Accessed 8 April 2024].

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.



and Decentralisation instead of an independent electoral commission.<sup>17</sup>

The main opposition parties and civil society groups under the banner Forces vives de la Guinée (FVG), have organized public protests aimed at forcing the military leadership to abide by the terms and conditions of the transition. The FVG further content that key processes like voter registration and voter education must be managed by independent bodies and that any constitutional reform must be put in abeyance until a new government is democratically elected and assumes office.

## **The role of the African Union in enforcing the right to information in Africa**

Aspiration 3 of [Agenda 2063: The Africa We Want](#) “An Africa of good governance, democracy, respect for human rights, justice and the rule of law” requires States to respect and protect human rights at all times, including during periods of public emergencies, disasters and health crises. The right to information is critical for the achievement of this aspiration as it facilitates the enjoyment of other human rights and underpins several key components of good governance and democratic societies.

Notwithstanding the challenges in ensuring the consistent implementation and compliance by member states, the African Union (AU) has made significant strides in the protection of the right to information in Africa. It has established six treaties that recognize the right to information: article 9 of the [African Charter on Human and Peoples' Rights](#), article 19 of the [African Charter on Democracy, Elections and Governance](#), article 9 and 12 (4) of the [African Union Convention on Preventing and Combatting Corruption](#), article 10 (3d) and 11 (2i) of the [African Youth Charter](#), article 6 of the [African Charter on Values and Principles of Public Service and Administration](#) and article 3 of the [African Charter on Statistics](#).

The AU also promotes the adoption and implementation of the right, through norm setting in soft law. Before 2010, the African Commission on Human and Peoples' Rights (the African Commission) struggled to initiate soft law on access to information in Africa.<sup>18</sup> The process of developing a blue print for member states to adopt access to information legislation began in November 2010, following the adoption of Resolution 167 (XLVII), Resolution on Securing the Effective Realisation of Access to Information in Africa.<sup>19</sup> The [African Platform on Access to Information Declaration of 2011](#), furthered the development of the right to information by providing key principles essential to the full realisation of the right to information. In 2012, the African Commission on Human and Peoples' Rights (the African Commission) passed the [Resolution to modify the Declaration of Principles on Freedom of Expression to include Access](#)

<sup>17</sup> Ibid.

<sup>18</sup> [African Union \(AU\) Activity Report by the Special Rapporteur on Freedom of Expression and Access to Information in Africa - 44OS at the 44th ordinary session of the African Commission in November 2008](#), Para 38.

<sup>19</sup> The blueprint is the [Model Law on Access to Information for Africa, 2013](#).



[to Information and Request for a Commemorative Day on Freedom of Information](#). After a two and half year's process, the African Commission adopted the [Model Law on Access to Information for Africa](#) (the Model Law) on 23 February 2013 and launched it on 12 April 2013. The [Model Law](#) was the first of its kind to be adopted by the African Commission and it is described as an important landmark in the development of soft law by the Commission.<sup>20</sup> The access to information landscape in Africa has improved significantly since the adoption of the [Model law](#).<sup>21</sup> In the same year, the Pan-African Parliament passed the [Midrand Declaration on Press Freedom in Africa](#) which calls on member states to use the [Model Law](#) to adopt and review access to information laws.

Principle 4 of the [Principles on Freedom of Expression in Africa](#) of 2019, requires the most favourable provision for the full exercise of the right to information to prevail when there is a conflict between domestic and international human rights law. In 2016, UNESCO adopted 28 September as the International Day for Universal Access to Information, after intense lobbying by the African Platform for access to information. Most recently, in 2022, the Executive Council endorsed the [AU Data Policy Framework](#) which aims to provide an enabling policy environment for Africans to maximize the benefits of a data driven environment.

The AU monitors members states' compliance with the right to information. The African Commission, through the office of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, prepares reports and makes recommendations which highlight priority areas for State intervention. The Special Rapporteur may write appeals to state officials requesting them to investigate rights violations with consent from member states.<sup>22</sup> The African Commission also encourages and provides technical assistance for the development of access to information laws in member states.

The AU has embraced a leading role in safeguarding the right to information in Africa. It has developed a fairly progressive normative framework for the protection of the right to information in Africa. The responsiveness of the AU to the Covid-19 pandemic, further underscores its readiness to adapt this framework to address contemporary challenges in Africa.<sup>23</sup> It is important to note that the duty to ensure the domestic implementation of these normative standards on the right to information lies with the member states. Around 27 countries in Africa have statutory guarantees to the right to information. However, right to information laws have made minimal impact in addressing

<sup>20</sup> Shyllon, Ololade, ed. [Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa](#). Pretoria University Law Press, 2018.

<sup>21</sup> Ibid.

<sup>22</sup> For example, on May 30 2013, Pansy Tlakula / Special Rapporteur, together with the Special Rapporteur on Human Rights Defenders, Honorable Commissioner Reine Alapini-Gansou, sent a joint letter of Appeal to the Republic of Burundi on the adoption of a new Draft Media Law (the Law) by [Burundi](#)'s National Assembly and Senate on 3 and 19 April 2013 respectively. See Pansy Tlakula, [Intersession Activity Report](#), 54<sup>th</sup> Ordinary Session (2013).

<sup>23</sup> [African Joint Continental Strategy for COVID-19 Outbreak \(Joint Continental Strategy\); African Union Guidelines on Gender-Responsive Responses to COVID-19](#).



the challenges of democracy in Africa.<sup>24</sup> The implementation framework has been hindered by the fact that soft law lacks strong enforcement mechanisms. The varying historical contexts, levels of development and capabilities in African countries also influence how the countries implement and benefit from access to law policies. This may be an indication of challenges at the members states' level or the AU system's level: either member states do not fully integrate AU's normative framework and fail to meet the standards and principles for access to information in their policies and practices, or there is lack of commitment to implement the existing laws; the AU needs to broaden its framework to adequately address the needs of Africans.

## **Right of access to legal information**

The administration of justice is carried through an integrated system comprising courts, law enforcement agencies, prisons and correctional facilities, lawyers, legal aid organizations etc. A proficient justice system should ensure equitable access to justice for all, regardless of circumstances, including disasters, public emergencies, and crises. An important aspect of this access is the access to legal information including the law and information on the operation of courts during crises. The right to access legal information stems from the State obligation to publish information about their functions, powers, structures and procedures.<sup>25</sup>

### *Right to access law: legislation, case law and Gazettes*

The State has a duty to ensure the proper functioning of legal systems and enhance equitable access to justice. This involves providing readily accessible legal information to help citizens and other people understand and engage with their rights and responsibilities. Access to law also impacts foreign investment and, consequently, development in Africa.<sup>26</sup> Potential investors are hesitant when they cannot determine the certainty and stability of legal regimes.<sup>27</sup>

The right to access legal information should be construed along the lines of the principle of open access. Open access addresses barriers to legal information such as complexity of legal language, availability in official and local languages, formats, privacy and copyright laws, technologies, public emergencies, disasters and health crises.

AfricanLII's [African Law Index](#) assesses the status of open access to African law. It ranks 55 African countries based on their commitment to provide open access to three categories of legal information: legislation, case law and Gazettes. These rankings offer insights into how African countries are progressing in terms of facilitating open access to legal information, shedding light on their strengths and areas for improvement.

<sup>24</sup> [The paradox of the right to information law in Africa](#).

<sup>25</sup> See the obligation to publish public information in the [Model Law on Access to Information for Africa 2013](#).

<sup>26</sup> Ward, Ruth. "[Building Free Access to Law in Africa: Some examples of successful projects](#)." *Legal Information Management* 14.4 (2014): 290-300.

<sup>27</sup> *Ibid.*



One of the most common myths about open access is that open access to information is achieved by merely publishing public information.<sup>28</sup> The index identified 5 main essential elements for law to be deemed openly accessible:

- Law should be publicly available, i.e., without access restrictions.
- Law should be available for free, i.e., with no requirement to pay a fee.
- Law should be openly licensed, i.e., be in the public domain or exist as openly licensed collections.
- Law should be up to date i.e., recently updated.
- Law should be open and availed in a machine-readable format.

These elements align with article 9 of the [African Charter on Human and Peoples' Rights](#), which establishes the right to receive information and the duty of states to ensure the promotion and protection of this right. The [Model Law on Access to Information for Africa](#) 2013 and the [Principles on Freedom of Expression in Africa](#) incorporate these Charter principles and international standards, including accessibility to all without discrimination, the obligation for States to publish public information, and the need for a clear and unambiguous access process.<sup>29</sup>

Kenya ranks top with an overall score of 93%, followed closely by Namibia with 89%, Uganda at 83%, Rwanda at 75% and South Africa at 74%. With Kenya leading in terms of providing access to legislation (100%) and case law (96%) and Rwanda (91%) in terms of providing access to Gazettes. 21 countries tied at the bottom for failing to provide access to legal information.

The right to access the law remains insufficiently realized in Africa especially with respect to Gazettes. The index reveals that 60% of the surveyed African countries provide open access to at least one type of legal information.<sup>30</sup> However, only 15% of the African countries provide access to a full set of the legal information.<sup>31</sup> Notably, 35% of the countries give open access to more than one type of legal information,<sup>32</sup> while, 25% of the countries give access to only one type of legal document.<sup>33</sup> Alarmingly, 38% of the countries do not provide access to law.<sup>34</sup>

<sup>28</sup> [Shepherd, Elizabeth. "Freedom of information, right to access information, open data: who is at the table?." The Round Table 104.6 \(2015\): 715-726.](#)

<sup>29</sup> Principles 26-36 of the [Principles on Freedom of Expression in Africa](#).

<sup>30</sup> This percentage accounts for 33 countries out of the 55 countries surveyed.

<sup>31</sup> This percentage accounts for 8 countries out of the 55 countries surveyed. These countries include Kenya, Namibia, Uganda, Rwanda, South Africa, Tanzania, Algeria, and Côte d'Ivoire.

<sup>32</sup> This percentage accounts for 19 countries out of the 55 countries surveyed.

<sup>33</sup> This percentage accounts for 14 countries out of the 55 countries surveyed.

<sup>34</sup> This percentage accounts for 21 countries out of the 55 countries surveyed.



## Right of access to information on the operation of courts during public emergencies, disasters and health crises

Information is as important as water, food, medicine and shelter during public emergencies, disasters and health crises.<sup>35</sup> During the COVID-19 pandemic, we witnessed the heightened importance of the right to information and government accountability. The COVID-19 pandemic exacerbated existing challenges to the enforcement of the right to information, with governments instrumentalizing the pandemic to expand the restrictions on the right. The pandemic highlighted the complexities of balancing the rights and duties of different stakeholders including individuals, governments and officials responsible for managing public interest information.<sup>36</sup> People need access to timely and accurate information to make safe choices for their well-being and their families, while governments have a duty to disseminate public interest information and address disinformation. Meanwhile, the pandemic also disrupted usual administrative procedures for handling information requests and maintaining public records.

Public access to information must be incorporated as part of the disaster management responses in times of crises.<sup>37</sup> Public authorities should proactively publish public interest information even in the absence of a request.<sup>38</sup> This duty is based on the presumption that all information held by public bodies is public information. As part of the response to the COVID-19 pandemic, most African countries enforced lockdowns. The process of enforcing the lockdowns was ad-hoc and irregular especially during the first month of the pandemic (March-April 2020).<sup>39</sup> Communication during this period was more focused on the need to control the transmission of Covid-19 than explanations on its impacts and other related uncertainties.<sup>40</sup>

Aspiration 2 of [Agenda 2063: The Africa We Want](#) highlights the importance of inclusive and participatory decision-making at all levels. It stresses the importance of involving various stakeholders in decision-making processes. Despite the existence of laws that mandate public participation in developing policies aimed at engaging stakeholders and soliciting their input, it is difficult to ascertain the extent to which African countries adhered to the requirement of public participation in developing and implementing strategies to respond to the COVID-19 pandemic. This suggests that, even with the legal and policy framework in place, the actual practice of involving the public and relevant stakeholders in shaping responses to the crisis may vary, and there is a need to assess and ensure the effective

<sup>35</sup> [IFRC, 'World Disaster Report 2005'](#).

<sup>36</sup> Mendel, T. and Notess, L. "The right to information in times of crisis: access to information – saving lives, building trust, bringing hope!" *World trends in freedom of expression and media development: issue brief*). UNESCO. *Erişim Tarihi* 28 (2020): 2021.

<sup>37</sup> [UNESCO "The Right to Information in times of crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope!" \(2020\)](#).

<sup>38</sup> ["International mechanisms for promoting freedom of expression: joint declaration by the UN Special Rapporteur on freedom of opinion and expression, the OSCE representative on freedom of the media and the OAS Special Rapporteur on freedom of expression" \(2004\)](#).

<sup>39</sup> Dunford, Daniel, et al. "Coronavirus: The world in lockdown in maps and charts" *BBC News* 9 (2020): 462.

<sup>40</sup> Khan, Shabana, et al. "Risk communication and community engagement during COVID-19" *International Journal of Disaster Risk Reduction* 74 (2022): 102903.

application of these principles.

The operation of the justice system (courts, police, lawyers, prisons) during crises is important to maintain social order, facilitate essential legal proceedings to protect vulnerable groups from the effects of the crises and to protect human rights. During crises, States are under a positive obligation to recognize and establish user-friendly systems that facilitate practical access to information on the operation of the justice system.<sup>41</sup>

With regards to courts, crises may result in logistical barriers to the access to justice such as the inability to conduct physical court hearings or facilitate physical case filing. States, through the judiciary, must communicate any measures taken to change the operation of the courts.<sup>42</sup> They must establish and execute emergency regulations that address access to information relating to court closures, remote proceedings, rescheduling, the use of online procedures for case filing, appearances, the recognition of electronic evidence, and the implementation of electronic case management systems.

AfricanLII's scorecard titled [Justice Undeterred: Africa's Legal Landscape in the Face of COVID-19](#) examined 11 African countries "preparedness in terms of facilitating and maintaining access to courts during the first month of the pandemic (March-April 2020)". The scorecard revealed that all the 11 African countries had at least one court open during the first month of the pandemic with varying degrees of physical operations.<sup>43</sup> They used press briefings to communicate precautionary measures on an ongoing basis, scaling down physical court operations while scaling up the use of virtual hearings in some or all types of matters. The information was then published on judiciary websites. While the pandemic presented an opportunity for African countries to promulgate or update rules on virtual hearings, admission of electronic evidence and electronic case management systems, this did not happen in countries like Malawi, Eswatini and Ghana.<sup>44</sup>

The right to information during emergencies should be construed according to five main aspects: early warning, transparency, accessibility, access to the internet, independent media and participation.<sup>45</sup> These aspects are discussed to highlight the role of the judiciary in keeping the public informed about court operations during a crisis.

<sup>41</sup> [UNESCO "The Right to Information in times of crisis: Access to Information – Saving Lives, Building Trust, Bringing Hope!" \(2020\)](#).

<sup>42</sup> [N. Off. On Drugs & Crime, Guidance Note, Ensuring Access to Justice in the Context of COVID-19 \(May 2020\)](#); see also [United Nations and the Rule of Law: Access to Justice, U.N., https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice \[https://perma.cc/X6QP-BMHM\]](#).

<sup>43</sup> Tanzania, South Africa, Uganda, Kenya, Botswana, Namibia, Ghana, Lesotho, Malawi, Zambia and Eswatini.

<sup>44</sup> Ibid.

<sup>45</sup> Silvia Venier, A Right to Information Relevant to Disaster Situations: Broadening the Concept beyond Early Warning and Addressing the Challenges Posed by Information and Communication Technologies [article] [https://brill.com/previewpdf/journals/yido/1/1/articlep210\\_210.xml?pdfjsinlineViewToken=2021768331&inlineView=true](https://brill.com/previewpdf/journals/yido/1/1/articlep210_210.xml?pdfjsinlineViewToken=2021768331&inlineView=true).



## Link to judiciary

### Early warning

The role of the judiciary is to uphold the rule of law, protect individual rights, and provide legal guidance and remedies as necessary to ensure that justice is maintained, even in challenging circumstances. The concept of early warning in the context of changing the operation of courts during emergencies refers to the proactive identification of potential issues or challenges that may arise because of an emergency situation.<sup>46</sup> It involves the timely recognition of factors that could disrupt the regular functioning of the judicial system and the formulation of strategies to address them effectively. However, a crucial question arises regarding the threshold for States to issue early warnings before and during a crisis, while balancing the risk of raising unnecessary panic or compromising public health measures?

### Transparency

During public emergencies, the judiciary's responsibility is to maintain trust in the legal system by offering transparent and unbiased information regarding modifications to court operations. This information should encompass the nature of measures, their legal foundation, timing, and review processes, all without generating unnecessary panic. The communication should be prompt, sufficient and accurate, allowing the public to understand the processes adopted by the government, their intention and desired outcomes. Striking the right balance in transparency is challenging, as an excess or lack of information may lead to panic and paranoia.

### Accessibility/open access

The judiciary should ensure that information is accessible to all members of the public, including those with disabilities and those who may face barriers to access.

There should be a clear, unambiguous and rapid procedures for accessing information on the disaster and the measures adopted by the judiciary. Accessibility of the information should be assessed based on whether it is: publicly available, free, openly licensed, up to date and availed in a machine-readable format.<sup>47</sup> The information should also be accessible in official languages and local languages, as much as possible.

<sup>46</sup> Venier, Silvia. "[A Right to Information Relevant to Disaster Situations: Broadening the Concept beyond Early Warning and Addressing the Challenges Posed by Information and Communication Technologies](#)." *Yearbook of International Disaster Law Online* 1.1 (2019): 210-232; Seng, Denis Stanley Chang. "Improving the governance context and framework conditions of natural hazard early warning systems." *IDRiM Journal* 2.1 (2012): 1-25; Khankeh, Hamid Reza, et al. "[Early warning system models and components in emergency and disaster: a systematic literature review protocol](#)." *Systematic reviews* 8 (2019): 1-4.

<sup>47</sup> Refer to the elements for law to be deemed openly accessible in the [African Law Index](#).



### *Access to the internet*

Access to the internet plays a pivotal role in the judiciary's efforts to enhance access to information during emergencies. The internet allows the judiciary to maintain consistency in its communication practices by providing a reliable platform for sharing information. Regular updates can be efficiently disseminated to the public, ensuring that everyone has access to the latest developments. Websites, social media channels, and email communication enable the judiciary to convey critical information promptly and consistently. This online presence empowers individuals to stay informed about changes in court operations, legal procedures, and emergency-related measures. The internet also enables the judiciary to be adaptable and responsive to changing circumstances during a crisis. Online platforms provide the flexibility to adjust communication strategies in real-time. For instance, during evolving emergencies, the judiciary can use its online presence to update the public on court operational changes, safety measures, and relevant legal information promptly.

Consequently, the right to open and secure internet is a prerequisite for the enjoyment of the right to information including during public emergencies, given the migration of essential services to online platforms during these times.<sup>48</sup>

### *Independent media*

The media plays a crucial role in overseeing the judiciary's actions during public emergencies and crises to ensure they are effective, ethical, and lawful. The judiciary often relies on the media to share critical updates on the operation of courts during emergencies. Unjustified restrictions on media freedom may impede its ability to report, investigate, and provide independent coverage. This, in turn, curtails the media's capacity to monitor and assess the judiciary's responses. As a result, citizens may be deprived of diverse perspectives, potentially leading to an incomplete understanding of the situation.

### *Public Participation*

In the context of the judiciary's role in ensuring transparency and access to information during crises, it is vital to involve key stakeholders in the justice system, such as lawyers, civil society organizations, and the public. They hold a legitimate right to participate in shaping the responses and measures that affect the justice system. The judiciary should provide a platform for these stakeholders to express their concerns and take those concerns into account.

While it is recognized that public involvement may be limited during emergencies, determining who should

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<sup>48</sup> [Human Rights Council Forty-fourth session 15 June–3 July 2020 Agenda item 3, Disease pandemics and the freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.](https://www.ohchr.org/EN/Issues/Documents/2020/Report-on-the-right-to-freedom-of-expression-and-opinion.pdf)



participate becomes a key consideration. This raises questions about whether the focus should be on the most vulnerable individuals who are disproportionately at risk in the event of a disaster, or if it should extend to all stakeholders within the justice system. Additionally, evaluating the effectiveness of this participation is crucial.

## **Conclusion and recommendations**

The right to access legal information encompasses six interconnected aspects: early warning, transparency, accessibility/open access, access to the internet, independent media and public participation.

African nations are struggling with implementing this right to ensure equitable access to justice, especially during crises. The AU should consider analysing the right to information in terms of access to legal information and provide recommendations for governments and other actors on:

- Early warnings: the right balance of transparency excessive vs lack of information during a disaster
- Open access to legal information
- Restriction of the right to information with reference to internet shutdowns and the media during a pandemic
- Public participation during crises who should participate and how their involvement qualifies as effective participation.

**END**



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